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HB 246

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Testimony in Opposition to House Bill 246
(Local Government Approval of Conservation Easements)

To: House Local Government Committee, Montana Legislature

From: Andrew C. Dana, Esq.

Date: January 29, 2013 (Room 172)

Madam Chairman and Committee Members: My name is Andrew Dana. I am an attorney from Gallatin County who for the last 22 years has specialized in conservation easement law. I have represented numerous landowners who have granted conservation easements in Montana. I currently represent a number of land trusts throughout Montana and Idaho, and I consult nationally about conservation easement law.

My brothers and I also own a 1,700 acre cattle ranch on the Yellowstone River in Park County on which my parents placed a perpetual conservation easement in 1982. Given the escalation in property values in the Paradise Valley since my parents purchased our ranch in the 1960s, it is safe to say that without the conservation easement on our property, my brothers and I would have been forced to sell the ranch to pay my parents' estate taxes. The conservation easement has allowed us to keep the ranch in the family by reducing the size of my parents' estate, and today, we even have hope that we can pass along our ranching tradition to our children.

With the foregoing background, I oppose HB 246 for many reasons, but I want to mention six significant concerns with this bill:

1. **HB246 misconceives the relationship between land-use planning law and conservation easement law.**

Conservation easements are not -- and never have been -- substitutes for subdivision regulation, zoning, or any other form of comprehensive planning. Instead, conservation easements are individually negotiated transfers of a set of property rights from a landowner to public bodies, or to qualified non-profit organizations (called "land trusts"). They are intended to preserve and protect by voluntary, private action, Montana's natural, historical, and cultural resources on private lands. As Section 76-6-103, MCA, specifically states:

> **76-6-103. Purposes.** In accordance with the findings in 76-6-102, the legislature states that the purposes of this chapter are to:
> (1) authorize and enable public bodies and certain qualifying private organizations voluntarily to provide for the preservation of native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interest;
> (2) provide for the preservation of other significant open-space land anywhere in the state either in perpetuity or for a term of years; and
> (3) encourage private participation in such a program by establishing the policy to be utilized in determining the property tax to be levied upon the real property which is subject to the provisions of this chapter.

Quite simply, these statutory purposes differ substantially from community-based land-use regulations (zoning laws, subdivision regulations ,etc.), which impose collective, community value judgments on private landowners, rather than allowing such landowners to voluntarily protect unique resources with public value that are located on their private lands, as conservation easements do.

Two aspects of Montana's conservation easement laws especially highlight the differences between governmental-mandated land-use planning laws and privately granted conservation easements.

a. First, the title of Montana's conservation easement enabling statute is the "Montana Open Space Land and *Voluntary* Conservation Easement Act." Section 76-6-101, M.C.A. The word "voluntary" is critical. It signifies that landowners freely choose to exercise their private property rights to grant conservation easements on their lands for public benefit. By contrast, subdivision regulations, zoning, and comprehensive planning mandate landowner compliance with community-based laws, regulations and ordinances.
b. Second, Section 76-6-206, M.C.A., currently provides for a non-binding local government review of conservation easements "to minimize conflict with local comprehensive planning" and to allow local government "to comment upon the relationship of the proposed conveyance to comprehensive planning for the area." This provision for non-binding review reflects the law's current respect for landowners' purely private decisions about how to exercise their property rights. Just as the landowner who grants an access easement to a neighbor, or who conveys the timber and logging rights to a logging company, the landowner who grants a conservation easement to a land trust exercises her independent property right to do so, free from local government regulation under comprehensive planning laws.

That said, conservation easements do not give landowners, land trusts, or anyone else dispensation to ignore local land-use laws. Landowners with conservation easements on their properties must still comply with subdivision laws, zoning laws, and all other comprehensive planning rules or regulations. So,

- If the land-use restrictions in conservation easements are more restrictive than local land-use laws, landowners must comply the terms of the more restrictive conservation easements; but
- If the local land-use laws are more restrictive than conservation easements, landowners must comply with the local laws and ordinances.

In short, community-based, governmentally mandated land-use laws and private, voluntary conservation easement arrangements serve two distinct public policy goals. One set of laws imposes collective restrictions on landowners' exercise of their property rights. The other set of laws reflects voluntarily decisions by private property owners to protect and preserve unique resources of special significance on individual tracts of land for future generations of Montanans. They are complementary, not competing, legal regimes that serve different public policy purposes.

Unfortunately, HB 246 completely undermines this important distinction.

2. **HB246 inappropriately transforms county growth policies into regulatory laws and ordinances.**

HB 246 most egregiously confuses conservation easement law with regulatory land-use law by transforming county growth policies into conservation easement regulatory documents. Currently, Montana's Growth Policy Act flatly states at Section 76-1-605(2), M.C.A.:

> (2) (a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.
> (b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

This provision was expressly inserted into the Montana Code by the Montana legislature in 2003 after much protracted debate and public and private misconception about the reach and scope of growth policies as planning documents, not regulatory documents. As the Montana Supreme

Court held just within the past few months, growth policies, in and of themselves, do not and cannot regulate specific land uses. Instead, as *planning* documents, growth policies inform local governments about what zoning ordinances, county regulations, and other regulations must contain. As explained by the Supreme Court, land-use planning regulations must "substantially comply" with growth policies, and if they do, they are enforceable. But, the growth policies themselves cannot regulate land uses. *See* Helena Sand and Gravel, Inc., v. Lewis & Clark County Planning and Zoning Commission, 2012 MT 272, at ¶17 (November 30, 2012).

An important public policy reason that growth policies are non-regulatory is that local communities everywhere appreciate that the land-use planning needs of their communities are best served with a variety of approaches and tools, some regulatory like subdivision laws and zoning, and some non-regulatory, like conservation easements. As explained in **Montana's Growth Policy Resource Book** (April, 2009, page 43), published by the Department of Commerce:

> "Regulatory and non-regulatory tools are available to help implement a growth policy. Common **regulatory means for implementing growth policies** include building codes, subdivision regulations, or zoning. . . .
>
> Implementation tools are that are **non-regulatory** including [*sic.*] capital improvements planning, **conservation easements**, open space bonds to acquire land for parks or trails, or sponsoring applications for community improvement projects for state or federal grant programs . . . Conservation easements can be encouraged to reduce the development of productive agricultural lands, prime wildlife habitat, riparian corridors or other critical natural areas."

HB 246 would turn this distinction between regulatory and non-regulatory approaches to growth policy implementation completely on its head. If HB 246 is adopted, planning departments, planning boards, and county commissioners could turn conservation easements from voluntary private land use arrangements into involuntary, top-down, command-and-control regulatory tools, like zoning and subdivision regulation.

3. **HB 246 will result in less transparent land conservation transactions.**

As a matter of real property law in Montana, conservation easements are qualitatively no different than other private land-use arrangements. They are akin to, and have the same effect as, easements, servitudes and restrictive covenants which landowners freely convey and acquire every day in Montana without any government approval. For example,

- Montana's general servitude statute at Section 70-17-102(7), M.C.A., allows a landowner to grant to anyone, without government oversight or approval, "the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land." Such privately created servitudes achieve exactly the same outcome as conservation easements granted under Section 76-6-101, *et seq.*, MCA.
- And, although the conservation easement statute allows conservation easements to be granted and held "in perpetuity," traditional easements, servitudes and covenants can also last indefinitely because they "run with title to the land." If a landowner holds a road easement, for example, that easement passes from landowner to landowner indefinitely as an appurtenance to the land, just like a conservation easement.

The primary difference is that conservation easements expressly protect and preserve *for public benefit* Montana's open spaces, scenic views, agricultural lands, recreational opportunities, fish and wildlife habitat, and other natural and social values on land.

So, even though conservation easements and Montana's general servitudes, easements and covenants may be granted for exactly the same land conservation purposes and may have exactly the same effect on use of real property, HB 246 would require that *only* conservation easements must be approved by local government. Thus, for no apparent reason, HB 246 treats conservation easements differently than other private land-use restrictions, increasing the costs to landowners and society at large of regulation, diminishing freedom of contract, and eroding property rights.

The predictable effect if HB 246 is enacted will be that landowners who want to see the important resources on their properties protected in perpetuity will enter conservation servitudes and covenants with land trusts and governmental agencies, rather than conservation easements. If this occurs, local government will not have the benefit *any* notice or opportunity to review such arrangements. Section 76-6-206, MCA, requiring local, non-binding review of proposed conservation easements, would not apply. So, if the goal of the legislation is to foster greater oversight and transparency, HB 246 would utterly fail to achieve that goal because other private land use arrangements exist that allow accomplishment of exactly the same land conservation outcome without *any* public oversight.

4. **HB 246 threatens federal tax deductibility of conservation easements.**

Thousands of Montana landowners who protected the special character of their private land have been rewarded for decades with special federal income and estate tax deductions if they

voluntarily donate conservation easements to Montana land trusts or public bodies. But, federal tax benefits are available only if landowners grant their conservation easements as gifts to qualified charities, freely and in a spirit of "disinterested generosity." *See* U.S. v. American Bar Endowment, 477 U.S. 105 (1986).

By requiring regulatory approval of conservation easements, however, HB 246 will potentially undermine and threaten these federal tax benefits. The IRS views conservation easements that are granted to meet the regulatory conditions as *involuntary* grants. Therefore, any condition of approval placed on conservation easements by local government would turn voluntary, charitable conservation easement "donations" that qualify for federal income tax benefits into "exacted" conservation easements that do not qualify.

This tax trap is another reason why the current requirement for local review of conservation easements, at Section 76-6-206, MCA, is non-binding and non-regulatory. The drafters of our conservation easement statutes knew of the threat to the tax deductibility of conservation easements if such easements are conditioned on local governmental approval, and they wanted to be sure that Montana landowners, like landowners in virtually every other state are entitled to take full advantage of federal income and estate tax benefits.

If enacted, HB 246 therefore would create significant inconsistencies with the federal tax law of conservation easements, causing harm and lost opportunities for Montana property owners, and resulting in fewer donated conservation easements, thereby harming the general public as well. Why would the Montana legislature want to deprive the citizens of Montana of these tax planning opportunities that are available to the citizens of every other state in the United States?

5. **Local government approval is not necessary to protect taxpayer's direct public investment in conservation easements.**

In recent years, communities around the state have approved local open-space bonds which provide funding for part of the cost of conservation easement acquisitions. In all cases of which I am aware, the communities that have open-space land investment programs already require public hearings, planning board and county attorney review, and/or county commission approval of conservation easements before public funds may be expended on them. Furthermore, agencies of the State of Montana, including the Department of Fish, Wildlife & Parks, hold public hearings before deciding whether to invest public funds in conservation easements.

In short, whenever Montana taxpayers are asked to invest public funds in conservation easements, public opinion is routinely solicited and public oversight is routinely exercised. Under these funding programs, local government already confirms that conservation easements are in the public interest and consistent with county development policies and regulations before any such publicly funded easements are approved.

HB 246 is therefore entirely unnecessary legislation if the contention is that local or state government does not understand or is uninformed about publicly funded conservation easement acquisitions in Montana and about how such easements meet growth policy and land-use regulation goals.

6. **HB 246 politicizes voluntary land conservation and erodes free exercise of private property rights.**

So, if publicly funded conservation easements are already carefully reviewed and cannot move forward without local or state government approval, HB 246's sole regulatory target is those conservation easements that are now freely and voluntarily granted by private property owners. By requiring local government approval of these inherently private grants, HB 246 would thrust such purely private transactions into a very public, highly politicized process.

The vast majority of Montana conservation easements are created as individually negotiated, voluntary private land transactions that provide public benefit with little or no political or governmental interference. This apolitical process is exactly what the Legislature intended when it passed the "Montana Open Space Land and *Voluntary* Conservation Easement Act" nearly 40 years ago, and the results have been extraordinarily successful. Montana's system of conservation easement creation and administration is the envy of nearly every other state in the country. Our land trusts are national leaders.

Our system works so well precisely because it remains largely apolitical and voluntary. Landowners who grant conservation easements care deeply about preserving the unique special character of their properties and Montana's agricultural, wildlife, recreational and open-lands heritage. These are not political decisions or calculations.

And, a landowner's decision to place her property in a conservation easement preserves opportunity for future generations, just as surely as does a decision not to. The difference is that our current conservation easement laws preserve the opportunity afforded to private landowners, willingly and voluntarily,

- to continue Montana's long heritage of valuing working landscapes and recreational opportunities;
- to preserve chances to see unimpaired views of rimrocks and shorelines and mountain peaks; and
- to assure continuation of the healthiest fish and wildlife populations in the nation, all for future generations.

HB 246 would remove that privilege and power from the people -- from the very landowners who are closest to the land and who own these extraordinary resources -- and concentrates the power in the hands of a few local politicians. Is this what we want? Is this consistent with Montana's long tradition of protecting freedom of choice in the exercise of private property rights? I do not think so and I would hazard the statement that a very large percentage of private property owners in the state do not want more land use regulation.

Our conservation easement laws protect Montana landowners' fundamental rights to choose what happens to their property, without the interference of local or state government. Yet, ironically, HB 246 would take that freedom of choice away from landowners and make all conservation easements political land-use planning tools, subject to the changing whims of local officials. That would be a sad, sad day for those who care deeply about our agricultural, timberland, and natural heritage and for those who respect our private property rights system. For the foregoing reasons, I urge you not to pass HB 246.